81219-5

No. 81219-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LOUIS LANCILOTI, Petitioner

REPLY BRIEF OF PETITIONER/APPELLANT

Ramona C. Brandes, WSBA No. 27113
Eileen P. Farley, WSBA No. 9264
Attorneys for Petitioner/Appellant Louis Lanciloti

NORTHWEST DEFENDERS ASSOCIATION
1111 Third Avenue, Suite 200
Seattle, WA 98101
206.674.4700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

I. INTRODUCTION

The State's Response to Mr. Lanciloti's argument fails on the two questions before this court:

1. Do the local rules adopted by King County Superior Court comply with the requirements of Revised Code of Washington (RCW) 2.36.055?

No. RCW Ch. 2.36 permits a superior court with only one court facility to draw a single master jury list from the county's jury source list. RCW Ch. 2.36.055 allows a superior court with two court facilities to draw one master jury list from the jury source list for each court facility. The King County local rules create three master jury lists for each court facility and allow each trial judge to choose among them in every case.

2. Does Article 1, Section 22 of the Washington State Constitution allow a superior court to exclude jurors residing in half the geographic area of the county from service?

No. Every Washington territorial and state law has prescribed a similar process for the creation of the jury source list from which the panel for a jury term will be selected. This process has always begun with a county-wide list of persons eligible to serve as jurors, similar to the jury source list prescribed by RCW 2.36.010 (8). All previous

Washington territorial and state laws drew jurors for court terms from that source list and did not exclude jurors based on where they might reside in the county.

The Washington laws governing selection of jury venire included a "safety valve" allowing the court to summon jurors not on the list of jurors selected for a particular term if the number of jurors responding to the original summons was insufficient. See Section 6, chapter 57, Laws of 1911, . Some statutes also permitted the court to summon a jury from an open venire but this was an exception from the presumed method of summoning jurors. *Id.*

The state constitutions and decisions from other jurisdictions cited by the state are largely from jurisdictions whose constitutions provide either: 1) that a jury may be summoned from a county or a district; or 2) which allow a county to be divided into more than one judicial district. The Washington Constitution provides for neither.

The logical conclusion of the state's position is that any superior court, if legislatively authorized, could draw its juries from less than the entire county. Under the State's rationale the Island County Superior Court, believing it difficult for residents of Camano Island to travel to Whidbey Island and that a venire of persons closer to the courthouse would yield a greater response to jury summonses, could summon only

jurors who live on Whidbey Island to serve in criminal cases. It is hard to believe that the drafters of the Washington territorial laws and constitution, who lived in times when jury service required travel by horseback over dirt roads, would agree that a few minutes extra travel on a well paved road should preclude citizens from the obligation and the opportunity to serve as jurors.

II. ARGUMENT

1. The Local Rules Adopted By King County Do Not Comply With The Statutory Procedure For Creating A Jury List.

A. RCW Chapter 2.36 Allows King County To Create Only One Master Jury List Per Case Assignment Area.

RCW 2.36.054 and RCW 2.36.055 direct the superior court of each county to create a jury source list that includes all registered voters residing in the county, all driver's license holders residing in that county and all identity card holders residing in that county. The list is to be updated each year. "The superior court at least annually shall cause a jury source list to be compiled from a list of all registered voters and a list of licensed drivers and identicard holders residing in the county." RCW 2.36.055.

Courts with more than one superior court facility and a separate Case Assignment Area for each facility may divide "the jury source list

into Jury Assignment Areas" for each facility and its Case Assignment Area. RCW 2.36.055.

From the annually created jury source list (for counties with a single courthouse), or from each jury assignment list (for counties with more than one courthouse), the court "shall compile a master jury list." RCW 2.36.055. Prospective jurors will be randomly selected from the master jury list. RCW 2.36.010 (9). It is the "duty of the judges of the superior court to ensure continued random selection of the master list and jury panels..." RCW 2.36.065.

B. King County's Local Rules Create Three Master Lists Per Case Assignment Area And Allow The Prosecutor To Choose Between Case Assignment Areas.

The King County local rules adopted to carry out RCW 2.36.055 are a triumph of compromise over reason. The rules allow each trial judge, in each case before him or her, to summon jurors:

(1) From the county as a whole;

(2) From the Jury Assignment Area in which the courthouse sits, the boundaries of which Area may be adjusted by the administrative office of the courts at the request of a majority of the judges "when required for the efficient and fair administration of justice..." RCW 2.36.055; and

(3) From the Case Assignment Area in which King County's other courthouse sits, the boundaries of which Area may be adjusted by the Presiding Judge "when required for the efficient and fair administration of justice in King County." Local Civil Rule (LCR) 82(3)(C), Local Criminal Rule (LCrR) 5.1 (C).

"The court on its own may assign cases to be heard by jurors drawn from another Case Assignment Area in the county, or from the entire county, or may assign or transfer cases to another Case Assignment Area...whenever required for the just and efficient administration of justice..." King County Local General Rule (LGR) 18 (2); LCrR) 5.1.

The rule allows judges concerned about differences between jury panels summoned from the north and south half of the county to summon jury panels drawn from the entire county. It allows judges concerned about possible prejudice of jury panels drawn from only the half of the county in which an offense is alleged to have been committed to summon jurors from the other half of the county. And it allows judges concerned that there are an insufficient number of jurors available in one Case Assignment Area to draw jurors from another area.

What the local rule does not do is satisfy RCW 2.36, which requires that each county, or each Case Assignment Area, draws jury panels from a master list. The statute does not authorize master lists. The

Legislature intended and permits trial judges in a county or a Case Assignment Area to use a single master list. The statute did not authorize each trial judge on the superior court bench a choice of master jury lists. The King County local rules, however, do just that. Each trial judge, in each case before him or her, may choose between a jury list drawn from the county as a whole, a jury list drawn from the Case Assignment Area in which the court sits, and a jury list drawn from Case Assignment Area in which King County's other courthouse is situated.

The local rules also effectively allow a prosecutor to "pick" which jury assignment pool he or she prefers. LCrR 5.1 authorizes the prosecutor to make an *ex parte*, pre-filing application for an exception from the rules governing where a case should be filed. "The Prosecutor in advance of filing a particular case, for good cause shown, may apply *ex parte* to the Chief Criminal Judge for an exception to the normal case assignment area." LCrR 5.1(3)(H).

The rule is silent on how a pre-filing application for an exception from the rule must be presented. Presumably, the record would also be silent, once the case is filed, about the *ex parte* contact. The State's ability to select among the jury master lists by unilaterally changing Case Assignment Areas does not comport with the policy set forth in RCW 2.36. 080 that "persons selected for jury service be selected at random

from a fair cross section of the area served by the court..." (Emphasis added.)

This muddle of jury lists is ripe for mischief and manipulation. The local rules do not comply with the statute and must be struck down.

2. **Washington's Legislative History And The Case Law Interpreting It Have Never Permitted A Court To Exclude The Citizens of A Portion of A County From The Opportunity To Serve As A Juror.**

A. **Beginning With The Territorial Laws of 1854 Until The Present, Jurors In Washington Were Summoned From A County-Wide Source List.**

In 1846, after years of dispute and negotiation, the United Kingdom ceded the land that is now Washington, Oregon and Montana to the United States. Two years later Congress created the Oregon Territory, which included what is now the State of Washington. 30th Congress, Statutes at Large, Sess. I, Ch.177.

In 1853 Congress passed the Organic Act, carving the Territory of Washington from the Oregon Territory. 32nd Congress, Statutes at Large, Ch. 90. Oregon became a state that same year but Washington remained a territory until 1889, when it joined the union.

The Washington legislative assembly convened its first session on February 28, 1854. Among the first statutes passed by the assembly was "An Act Relative to Grand and Petit Jurors," which directed the county commissioners to prepare a "full and correct list of all persons qualified to

serve as grand jurors and also a full and correct list of all persons qualified to serve as petit jurors in their respective counties...." From this list the county auditor was to draw at random the names of grand and petit jurors who would be summoned for the next term of court.

The pool from which these jurors were to be drawn was a list of all qualified electors of the county, or for the grand jury, all those who were qualified electors and householders. Qualified electors included males over the age of 21 who were citizens or who had pledged to become citizens within six months and who had lived in the territory for a year.

The Washington Territorial Code of 1881, which formed the basis of the first Washington state statutes directed "Every board of county commissioners...shall cause to be prepared and thereafter shall keep in the office of the county auditor, two jury lists, one of which shall contain the names of all persons qualified to serve in their county as petit jurors and the other the names of all persons qualified to serve in their county as grand jurors." Washington Territorial Laws, Chapter CLII, Section 2080.

From this list the commissioners were to draw a list of 25 persons to serve as petit jurors and 25 persons to serve as grand jurors. This list was sent to the district court and, from time to time the judge of that court was instructed to allot, in proportion to the number of votes cast in each

district included in the court's jurisdiction, the number of jurors to be drawn for service at the next term of court.

When the first assembly of the state Legislature met in December 1889, it enacted a statute that directed the courts to draw jury panels from "the last jury list certified by the county commissioners...," continuing the territorial practice of drawing jury panels from a list of all eligible jurors in the county. Washington Session Laws of 1889, An Act Relating to Petit Jurors for Superior Courts. Having thoroughly mixed the names of the jurors and placed them in a box, "the clerk, or his deputy, being blindfolded, shall draw the requisite number to serve as petit jurors."

No Washington territorial law, or later Washington statutes, excluded qualified jurors from the list from which jurors would be drawn for service—until the 2007 amendment of RCW 2.36.055.

The territorial laws and later statutes authorized trial judges to draw jurors from qualified bystanders but only ***after*** the jury source list was exhausted. "When from any cause there are no qualified grand, or no qualified petit jurors, or not a sufficient number of each in attendance, the court may, without naming them in the venire, order as many as may be necessary to be summoned from any county or counties in the district." Chapter CLII, Laws of 1881, Section 2083. *See also* Session Laws of 1889-90. "If for any cause a sufficient number of jurors are not returned

by the sheriff in the manner first herein contemplated, the court may order the panel filled from the by-standers by the sheriff or may fill such panel by an open venire, for a sufficient number, directed to the sheriff."

The laws of 1854 did give the trial court the authority not to draw from the list prepared by the county commissioners and instead to direct the sheriff to summon jurors from the body of the county or bystanders. Even that statute, however, did not give the court authority to exclude eligible jurors from service. Similar "safety valves" were built into subsequent territorial and state laws. In all cases, however, the presumption was that jurors would be selected at random from a county-wide list of eligible jurors.

The state turns this authority on its head, arguing that the court's authority to summon jurors from outside the list when the list is insufficient means the court may exclude jurors from the list in the first place.

B. The Washington Territorial Cases Cited By The State Do Not Support A History of Excluding Jurors From Service Based On Where They Live In A County. Two of Them Illustrate The Damage To The Court's Integrity When The Process For Summoning Jurors Is Manipulated Or Appears To Be Subject To Manipulation.

The State cites *Leschi v Washington Territory*, 1 Wash. Terr. Reports 13 (1857) only for the information that Washington was divided

into three judicial districts. *Leschi*, however, is one of the most notorious decisions issued by a Washington court. It was so contentious that in 2004 the Washington Legislature asked this court to review its decision of almost 150 years ago. While the court declined to do so, Chief Justice Alexander was instrumental in convening a Court of Inquiry and Justice to rehear the case.

Leschi, Chief of the Nisqually Tribe, was charged by a grand jury with murder of a white man during the Indian Wars, a time of great upheaval in Washington. (In addition to the Indian Wars the territorial Governor and Legislature became embroiled in a bitter dispute when Governor Isaac Stevens declared martial law in Pierce County on the grounds that citizens there unlawfully supported the tribes.)

Chief Leschi's first trial, in Pierce County, ended in a mistrial when two jurors refused to convict him. The judicial districts were subsequently redrawn enabling the authorities to move his second trial to Olympia, where Chief Leschi was convicted and sentenced to death by hanging.

On appeal, Chief Leschi contended that the jury which heard his second trial was unlawful and that his second trial should have been held in Pierce County. The Supreme Court rejected his argument, though noted "it is to be regretted that...a more summary mode of trial, one in

accordance with the practice of the government and in perfect consonance with the rule of international law, had not been adopted." *Leschi v Washington Territory*, 1 Wash. Terr. Reports 13 (citation omitted).

Even in 1857, with the Indian Wars a recent and bitter memory, the verdict and Chief Leschi's execution were controversial. The sheriff of Pierce County, ordered to transport Chief Leschi to his execution, allowed himself to be arrested without protest by the United States Army on the day he was to bring the Chief to the gallows. The Army held the Sheriff until the warrant for Chief Leschi had expired.

The warrant was reissued and Chief Leschi was hung on February 19, 1858.

The Court of Inquiry and Justice found that Chief Leschi, if involved in a killing, did so while at war. As such his actions would have been a legitimate act of war and immune from prosecution.

The state also relies upon *Yelm Jim v Washington Territory*, 1Wash.Terr. Reports 63 (1859) to support its position that jurors could be summoned from less than the entire county. Yelm Jim, or Wa he lut, was one of Chief Leschi's lieutenants. A grand jury was summoned to hear evidence against him but the court discharged the grand jurors and directed the sheriff to summon bystanders to hear the evidence. This

second grand jury returned an indictment against Wa he lut, who was later convicted and sentenced to death.

On appeal, Wa he lut argued that the court's decision to discharge the regularly summoned grand jurors for an unspecified "irregularity" and to summon bystanders was fatal error to the indictment. The Supreme Court rejected that contention and affirmed Wa he lut's conviction and death sentence.

Wa he lut later was "reprieved the day before he was to be executed and sent at midnight to his friends without previous warning." Meeker, The Tragedy of Leschi, Everett, WA, the Printers, 1980; History of Thurston County Washington from 1845-1895 by C.J. Rathbun, electronically transcribed verbatim by Edward Echtle at ThurstonHistory@earthlink.net.

The State's reliance on *McCallister v. Washington Territory*, 1 Wash.Terr. Reports 360 (1872) misunderstands the nature of a motion for change of venue in the multi-county judicial districts then existing in Washington. McCallister was charged with the crime of murder, allegedly committed in Walla Walla. He was tried in the First Judicial District, which included Walla Walla and several other counties. He moved for a change of venue, which in those days would have meant a change to either the Second or Third Judicial Districts. The court denied the motion for

change of venue and the defendant objected that, at a minimum, the court should have excluded jurors from Walla Walla. The Supreme Court agreed that exclusion would be a remedy *where the sub-district is composed of more than one county* and where the defendant has shown prejudice on the part of jurors. The court's holding there is similar to a contemporary motion for change of venue where each county has its own court. Rather than moving the trial, as would be common today, in multi-county judicial districts it was more efficient to "move" the jury pool supposedly tainted by prejudice.

C. The State's Interpretation of *State ex. rel. Lytle v. Superior Court* And *State v. Twyman* Would Create Separate Superior Courts In One County.

The State agrees that under the King County Superior Court is one court. *State ex rel Lytle v. Superior Court*, 54 Wash 284, 144 P. 32 (1910) Two thirds of the King County Superior Court departments are in a courthouse in Seattle, the remainder in a courthouse in Kent. The fact that judicial departments are in separate buildings should make no more difference than if they were on different floors of the same courthouse.

Under the state's analysis of *Lytle* and *State v. Twyman*, 143 Wn. 2d 115, 17 P.3d 1184 (2001), however, two thirds of these judicial departments may summon jurors from half the geographic area of the county and exclude jurors from the other half. The remaining third may

summon jurors from the other half of the county. According to the state this practice and any legislatively prescribed manner of summoning jurors is permissible. State's Brief at 25. Yet, how does this practice not create separate judicial districts in violation of *State ex, rel. Lytle v. Superior Court*, 54 Wash. 284, 144 P. 32 (1910)?

D. The Authorities From Other Jurisdictions Relied Upon By The State Are Largely From Jurisdictions Whose Constitutions Permit Either A Jury Panel Drawn From A County Or A District, Or Which Permit A Single County To Be Divided Into More Than One Judicial District, Neither of Which Is Permitted By The Washington Constitution.

The State discusses a number of cases decided at or near the time the Washington Constitution was adopted which deal with the area from which jurors must be drawn. Taken together, they support the conclusion that the drafters of the Washington Constitution could easily have said jurors should be drawn 'from the county or district' as the constitutions of several other states provided. The drafters of the Washington Constitution, however, did not include an alternate but said a jury must be "of the county".

Of the cases listed by the State in its brief, the majority deal with constitutions different than Washington's or support Mr. Lanciloti's position. See *State v. Page*, 12 Neb. 386, 11 N.W. 495 (1892), (a jury drawn from less than both counties comprising a judicial district violated

the defendant's state constitutional right to a jury of the county); *Hewitt v. Saginaw Circuit Judge*, 71 Mich. 287, 39 N.W. 56 (1888) (a jury drawn from the body of the county means that it must be drawn from every township in the county).

The bulk of the cases listed refer to state constitutions far different than that of Washington. Several allowed a jury to be drawn from a county or a district. *See* Ohio Bill of Rights, Section 10, the Wyoming Constitution, Wy. Const. Art I, Section 10 and the Minnesota Constitution, Minn. Const. Art I, Section 6. Washington's Constitution is much narrower—a jury must be drawn from the county.

Some state constitutions, unlike Washington's, permit a county to be divided into more than one judicial district. All of the cases listed in footnote 11 of the State's brief refer to counties that could be divided into more than one judicial district. Washington's Constitution is much narrower--it permits only one superior court per county.

E. The State's Effort To Limit Review of The Differences Between North And South End Jury Pools Ignores The Requirements of RCW 2.36.055.

RCW 2.36.055 directs the administrator of the courts to designate and adjust the boundaries of the Jury Assignment Areas based "on the most current United States census data...."

All of the differences between the jury pools described to the trial court, including differences in education, marital status and ethnicity, are based on data collected and identified as part of the 2000 census. The statute does not authorize the administrator for the courts to use only some of the census data. e.g., total population numbers, nor does it authorize the administrator to ignore dramatic differences between the Jury Assignment Areas. Presumably the assignment areas are to be designated based on census data to best reflect the composition of the county as a whole—and these Jury Assignment Areas do not.

The census data Mr. Lanciloti presented to the trial court showed that 48% of the jurors over age 25 in the north end jury venire had a college degree. Of similar jurors in the south end pool 24% had a college degree. *See* Clerk's Papers 31 and 90. This is only one of several dramatic differences-in income, marital status and Hispanic ethnicity-between the two half county pools. See Clerk's Papers 30 and 77.

The State argues that this court may look only to see whether there are differences north and south between groups that have been the subject of invidious discrimination or are members of a constitutionally recognized class. It ignores the statutory requirement that the jury pools be adjusted according to census data.

F. **Contrary To The State's Assertion, A Petitioner Raising A Sixth Amendment Claim Of Discrimination In Jury Selection Is Entitled To Rely Upon Differences Between The Population At Large.**

The State relies upon *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004) for the proposition that a Petitioner could not use general population data when raising a Sixth Amendment claim against how a jury venire is selected. *Sanders v. Woodford* is one of two decisions the Ninth Circuit held that "appear to be in conflict with the Supreme Court and..." other Ninth Circuit decisions. *United States v. Rodriguez-Lara*, 421 F.3d 932 (9th Cir. 2005). The better weight of decisions that allows a cross-section claim to rely on total population data, or where available, age-eligible population data. *United Sates v. Rodriguez-Lara* at 942.

Claims of discrimination in this context are usually raised by a defendant challenging a seated venire against the population as a whole. This case has not reached that point, but Mr. Lanciloti contends that splitting the county into two jury pools creates an impermissible difference between the population of the county as a whole and the population included in the Jury Assignment Areas, particularly in regards to the Hispanic population.

As always with statistics, the devil is in the details. Using the same numbers used as examples in the state's brief demonstrates a 20%

decrease in Hispanics in the north end Case Assignment Area from the number of Hispanics county-wide and a 40% increase in the Hispanics in the south end Case Assignment Area from the number of Hispanics county-wide. (State's Brief at 50.) And it is the county-wide venire that must be the standard because that is the jurisdiction of the court and that is the area from which the jury source list is drawn. RCW 2.36.055.

Again, using the numbers given by the State, a county-wide jury venire would expect to include approximately 5% Hispanic population. When the county is split, this drops to 4% in the North Case Assignment Area and increases to 7% in the North Case Assignment Area. The 4% Hispanic population of the north end Case Assignment Area is one-fifth (or 20%) less than the Hispanic population in King County as a whole. The 7% Hispanic/Latino population in the south end Case Assignment Area is two-fifths (or 40%) more than the Hispanic population in King County as a whole.

It does no good to say that the north end population represents the north end population, so therefore there is no problem. The jury source list, from which all jurors are drawn, is a county-wide list. The jurisdiction of the superior court is county-wide. The difference created by splitting the county must measure between the county as a whole and each Case Assignment Area.

III. CONCLUSION

The split jury pools created by King County violate RCW Ch. 2.36, prescribing how jury venires are created; the Washington Constitution Article I, Section 22, which guarantees defendants in criminal cases the right to a jury of the county; and the Sixth Amendment.

The local rules splitting the jury venire and creating multiple jury master lists should be struck down and the trial court should be required to summon a jury of the county to hear the charge against Mr. Lanciloti.

DATED this 10th day of October, 2008.

Eileen Farley/tw

Eileen P. Farley, WSBA No. 9264
Director, Northwest Defenders Association
Attorney for Petitioner Louis Lanciloti

Ramona Brandes/tw

Ramona C. Brandes, WSBA No. 27113
Attorney for Petitioner Louis Lanciloti
Northwest Defenders Association

FILED AS
ATTACHMENT TO EMAIL

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, I electronically filed the foregoing, and referenced appendices, with the Clerk of the Supreme Court using the CM/ECF system. A copy was also sent via U.S. mail to:

Supreme Court Clerk
Washington Supreme Court
415 - 12th Ave SW
P.O. Box 40929
Olympia, WA 98504

James Whisman
Office of the King County Prosecutor
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2362

I declare under penalty of perjury under the laws of the state of Washington, that the foregoing is true and correct.

DATED at Seattle, Washington on October 10, 2008.

Eileen Farrington

FILED AS
ATTACHMENT TO EMAIL

OFFICE RECEPTIONIST, CLERK

To: Terry Howard
Subject: RE: Lanciloti Brief

Rec. 10-10-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Terry Howard [mailto:Terry.Howard@nwdefenders.org]
Sent: Friday, October 10, 2008 2:58 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Lanciloti Brief

Dear Sir or Madam,

Attached please find Petitioner Lanciloti's Reply Brief in Cause No. 81219-5. Copies have also been mailed today to James Whisman, counsel for the State/Respondent.

Please let me know if you have any difficulty opening the documents or need additional information. I am out of town but you can reach Ms. Brandes at (206) 674-4700 ext. 3116 or Ramona.brandes@nwdefenders.org

Thank you,

Eileen Farley

Sent by Terry Howard <<Reply Brief Lanciloti 4-1.pdf>>

Terry Howard

Northwest Defenders Association

(206) 674-4700, Ext 3102

1111 Third Avenue, Suite 200

Seattle, WA 98101